IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO:

In the matter between:

HELEN SUZMAN FOUNDATION	First Applicant
FREEDOM UNDER LAW NPC	Second Applicant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
SHAUN ABRAHAMS	Second Respondent
DR JP PRETORIUS SC	Third Respondent
SIBONGILE MZINYATHI	Fourth Respondent
THE NATIONAL PROSECUTING AUTHORITY	Fifth Respondent

FOUNDING AFFIDAVIT

I, the undersigned

FRANCIS ANTONIE

do hereby make oath and say that:

1. I am an adult male director of the applicant, the Helen Suzman Foundation ("**HSF**"), situated at 2 Sherborne Road, Parktown, Johannesburg.

2. I am duly authorised to depose to this affidavit on behalf of the applicants.

3. The facts contained in this affidavit are within my personal knowledge, unless it appears otherwise from the context, and are both true and correct. Where facts are not within my personal knowledge, I refer to the confirmatory affidavit of Mr WJ Timm which will be filed herewith.

4. All legal submissions are made on the advice of the applicants' legal representatives.

INTRODUCTION

5. On 11 October 2016, the second respondent, the National Director of Public Prosecutions ("**the NDPP**"), in a press conference lasting over an hour ("**the 11 October press conference**"), announced to the world, in the most vivid detail and with unequivocal force, that the National Prosecuting Authority ("**NPA**"), after the conclusion of a full investigation, had decided to prefer serious and credible fraud and theft charges against the sitting Minister of Finance, the former Commissioner of the South African Revenue Service ("**SARS**") and the former Acting Commissioner of SARS.

6. This news, as the NPA was warned in prior correspondence, and, in the circumstances, inevitably, resulted in the South African market going into a tailspin, serious questions being posed as to the independence of the NPA and the NDPP, the workings of the Executive being affected and the country being rocked by political uncertainty.

7. By 31 October 2016, however, the charges (which were clearly never sustainable in law) had, *sans* apology, been withdrawn, with the NDPP performing a remarkable *volte face* and seeking now, incredibly, to blame the accused for the bringing of the spurious charges (as well as lying all

responsibility for the actual initial bringing of the charges at the feet of the third and fourth respondents).

8. This represented a remarkable about-turn from the NDPP's own theatrics at the 11 October media spectacle, where, seizing the limelight and as the responsible head of the NPA under section 179 of the Constitution, the NDPP lent his *imprimatur* to the legitimacy of the initial charges. At this press conference the NDPP announced to the world, after smearing the names of the accused for well over 30 minutes (through innuendo on completely unrelated matter, which has not even been investigated, being the co-called SARS rogue unit), that the NPA was prosecuting the accused.

9. The NDPP, desperately attempting to distance himself from the charges and his initial pronouncements, now brazenly claims that he should bear no responsibility for this debacle, instead placing the blame at the feet of, of all people, the charged individuals, the direct victims. His fastidious insistence that he is blameless and his unwillingness to shoulder responsibility sadly confirms that he is not fit and proper for the high office of the NDPP, which office is endowed with immense power and is the head of a critical component of our constitutional project. The NPA cannot learn from its most dramatic calamity, correct its egregious violation of rights, or repair the destruction of its integrity and reputation, while it is headed by somebody of the second respondent's character and competence.

10. At the core of the matter is a display of incompetence of a magnitude so stupefying that it beggars belief and/or the use of public power for such blatantly obvious ulterior motives that it has caused a national uproar, riots in the streets (see news report annexed "**FA1**") and the urgent summoning of the second respondent to Parliament to explain himself. This immense public power was exercised in a manner so recklessly that it did not only

severely impact on the rights of charged individuals and on the public's trust in the integrity of the NPA, but sent the economy into a nose-dive, wiping R50 billion off the Johannesburg Securities Exchange almost immediately. Yet, only 20 days later, and after all the damage was already done, the second respondent admitted that an elementary mistake had been made in bringing the charges and that the charges were (and had always been) utterly baseless.

11. In the circumstances of the matter, as developed below, the ineluctable conclusions are that the second to fourth respondents:

11.1 are incompetent and not fit to hold positions within the NPA; and / or

11.2 are not acting independently, are beholden to others, and are acting contrary to the constitutional mandate of the NPA, in order to promote and further their or others' ulterior purposes.

12. This requires urgent judicial redress, particularly given the first respondent's failure to act to protect the Republic, and the NPA, from the continued fumblings (be they innocent or cynical) of the second to fourth respondents.

IMPORTANCE OF THE RELIEF SOUGHT

13. This is an urgent application under Rule 6 of the Uniform Rules of Court, *inter alia*, seeking to review, set aside and declare unlawful the first respondent's failure, alternatively, refusal:

13.1 to institute an enquiry, under section 12(6)(a) of the National Prosecuting Authority Act, 1998 ("**NPA Act**"), into the second to fourth respondents' fitness to hold the offices of National Director of Public Prosecutions, of Acting Special Director of Public Prosecutions and Head: Priority Crimes Litigation Unit, and of Director of Public

Prosecutions respectively ("**the enquiries**") based on the conduct of each of the second to fourth respondents in respect of charges ("**the Charges**") which were brought and then withdrawn against the Minister of Finance, Mr Pravin Gordhan, MP ("**Min. Gordhan**"), Mr Visvanathan "Ivan" Pillay ("**Mr Pillay**") and Mr George "Oupa" Magashula ("**Mr Magashula**") (together, "**the accused**") by the NPA; and

13.2 provisionally to suspend the second to fourth respondents from office, under section 12(6)(a) of the NPA Act, pending the enquiries.

14. The applicants furthermore seek to direct the first respondent to institute the enquiries and provisionally to suspend the second to fourth respondents from office pending the enquiries.

15. As I shall demonstrate, there is simply no lawful basis for the first respondent's failure to exercise the power vested exclusively in him under section 12 of the NPA Act to institute the enquiries and provisionally to suspend the second to fourth respondents pending the outcome of those enquiries.

A matter of paramount public importance

16. This matter raises the core constitutional question: do we live in a society where government officials may use their powers recklessly and with a clear ulterior motive, with wanton disregard for the law or the effect of their conduct on the Republic, and yet continue to lead, participate in and operate one of South Africa's most important crime-fighting units? If the answer is no - and it must be no - then the protection of the rule of law requires prompt and clear action from the Court.

17. The second to fourth respondents wield enormous public power and occupy high level positions within the NPA. Such offices cannot be entrusted to individuals who have very publically used their power with utter recklessness, incompetence, clear ulterior purposes and with shattering effects on the economy. There can be no clearer case for the unfitness and impropriety of individuals for their offices.

18. The NPA is a constitutionally mandated organ which is indispensable to the protection of our constitutional democracy. The need to insulate the NPA from political and other interference, and to ensure its officers (particularly its most senior officer) are at least adequately competent, is attributable in part to the fact that at the core of its mandate is the requirement to investigate and prosecute all crimes, including high-level and high-profile corruption and other crimes, which often implicate important political figures. The converse of this duty is, likewise, to ensure that this immense power, from which significant consequences may flow for both the public and the individuals involved, is exercised properly, lawfully, and with respect to the rights of individuals involved.

19. In view of their conduct, and the fact that the test for being fit and proper is an objective one, the second to fourth respondents ought to have recognised the enormity of their failures and ought to have resigned of their own accord. They were given that opportunity, but have chosen – apparently on the basis of their own subjective assessment of their competence and fitness – to remain in office. Given their refusal to do their duty, there is a clear call for enquiries to be instituted into the conduct of the second to fourth respondents. Moreover, they should be suspended pending such enquiries. The incontrovertible evidence illustrates that they have misconducted themselves and lack the fitness and propriety required of their offices.

20. Each day that the second to fourth respondents are allowed to occupy their respective offices under this cloud of uncertainty and impropriety potentially irreparably prejudices the work of the NPA and does damage to the public perception of and confidence in this constitutionally mandated institution. There is no need to speculate about the risk that these officials pose. That risk has already been painfully confirmed beyond doubt by their conduct in relation to the charges recklessly preferred and then withdrawn against Min. Gordhan and Messrs Pillay and Mageshula (which resulted in inestimable damage to our economy, our country's reputation and the rights of those accused), and their steadfast refusal – through the NDPP – to acknowledge any wrong or accept any responsibility.

21. It also poses an unacceptable risk to the work of the NPA. This is particularly so when the second respondent, unrepentant with respect to his conduct to date, is already threatening that new charges may yet be around the corner for Min. Gordhan. His commitment to ruinous conduct is on public display, matched only by his wanton inability or refusal to see or accept responsibility for the role he is playing in destroying the credibility of the institution he is meant to head.

22. The only recourse available to preserve the sanctity of the office occupied by the second to fourth respondents (and the institution as a whole), and to protect the Republic from the devastating impact of the misuse of their power, is to approach this Honourable Court on an urgent basis for the relief set forth in the notice of motion which this affidavit supports.

23. This is a matter of profound national importance and, as I shall demonstrate below, there is no basis in law for the President's failure or refusal to institute the enquiries in respect of, or suspend pending those enquiries, each of the second to fourth respondents respectively. The first respondent has failed in

his constitutional duty to protect the integrity and independence of and public confidence in one of South Africa's most important corruption and crime fighting institutions and to uphold the rule of law.

24. It is clear the second to fourth respondents occupy positions at the very heart of the NPA's ability to function effectively to fulfil its constitutional mandate. Indeed, the second respondent has wide and sweeping powers under the NPA Act which can affect almost every aspect of the functioning of that organisation. The second to fourth respondents make dozens of critical operational, institutional and financial decisions which may have a substantial bearing on on-going sensitive and high profile investigations and pending cases, the rights and expectations of members of the public, and the very structure and operational integrity of the NPA, which would be difficult or impossible to reverse. They are also a proven severe threat to the economy of the Republic and, unrepentantly, the second respondent has threatened that his NPA may repeat his misconduct by bringing further ill-conceived charges in the near future, which can only be explicable on the basis of ulterior motive.

25. It is thus imperative that the offices occupied by the second to fourth respondents are not again abused, nor unlawfully compromised or impeded. The NPA, the office of the NDPP as well as other high level offices within the NPA must be, and must be perceived to be, independent of executive and political interference and competent to perform their duties. If the fitness and propriety of any office bearers are placed in doubt (in this case there is no doubt whatsoever about their unfitness for office), then the integrity of the institution as a whole is compromised and a perception among the public and members of the NPA is created that the NPA is not independent, is not competent and is vulnerable to executive interference or political influence.

The intransigent and supine attitude by the first respondent jeopardises the functioning of the entire criminal justice system and the rule of law which is the basis of our Constitution.

26. The importance of an impeccable prosecutorial service which has the capacity, willingness and fortitude to pursue the interests of the Republic above narrow political interests, and the effective prosecution of all crimes, including high level corruption and organised crime, cannot be gainsaid. As our courts have held previously, it is imperative that any threat to the efficacy and operation of a constitutionally mandated institution and any opportunity for political interference in the functioning of such institution must be addressed as a matter of urgency.

The duty to exercise public power

27. Where, as in this case, the first respondent has the power to suspend the second to fourth respondents and institute a disciplinary enquiry under a statute and the Constitution, there is a duty on that functionary to exercise such power when the jurisdictional facts for such exercise are present. Such duty is not discretionary, cannot be ignored, and is an objective exercise.

28. The first respondent has failed in his constitutional duty to exercise the power vested in him, lawfully or at all, in what clearly constitutes appropriate circumstances.

PARTIES

29. The first applicant in this application is the HSF. The HSF was established in 1993, and is a non-governmental organisation whose objectives are "*to defend the values that underpin our liberal constitutional democracy and to promote respect for human rights*".

30. The second applicant is Freedom Under Law NPC ("**FUL**"). FUL is an organisation that is primarily concerned with upholding the Constitution of the Republic of South Africa, 1996 ("**the Constitution**"), constitutionalism and the rule of law, particularly in the context of law enforcement agencies.

31. The applicants approach this Honourable Court, firstly, in their own interest. They are both organisations that are primarily concerned with the principles of democracy and constitutionalism, as well as the rule of law. The applicants contend that the NPA has acted unlawfully, irrationally and contrary to its mandate as the law enforcement body tasked with the prosecution of crimes in South Africa. The applicants thus have an interest in ensuring that the unlawful decisions of the NPA are set aside and that the NPA be prevented from taking further unlawful decisions which will prejudice the Republic as a whole and do irreparable violence to our democracy.

32. The applicants also approach this Honourable Court in the public interest. All South Africans have an interest in the rule of law, the requirements for a properly functioning constitutional democracy, and, in particular, that bodies charged with law enforcement and the prosecution of crimes act lawfully, in good faith, in accordance with their mandates, independently and in the best interests of the Republic. The far-reaching powers and functions of the NPA mean that it is essential that they act responsibly and in good faith in their interactions with members of the public and all other public officials.

33. The first respondent is the President of the Republic of South Africa ("**the President**"). It is the President's failures to suspend and institute enquiries into the fitness for office of the second to fourth respondents which are the subject matter of this application. This application will be served electronically on the email addresses identified in previous correspondence with the office of the Presidency, as well as being served care of the State Attorney.

34. The second respondent is the NDPP, Mr Shaun Abrahams ("**Mr Abrahams**"). Mr Abrahams'/the NDPP's office is located at Victoria and Griffiths Mxenge Building, 123 Westlake Avenue, Weavind Park, Silverton, Pretoria. Papers will be served at the above address and by way of email to the email addresses of Mr Abrahams and his executive assistant: skabrahams@npa.gov.za; and hzwart@npa.gov.za. The President's failures relate directly to Mr Abrahams and his misconduct.

35. The third respondent is Dr JP Pretorius SC ("**Dr Pretorius**"), the acting special director of the Priority Crimes Litigation Unit, cited in his personal and official capacities, whose place of business is at Victoria and Griffiths Mxenge Building, 123 Westlake Avenue, Weavind Park, Silverton, Pretoria. Dr Pretorius is ostensibly the prosecutor who, in consultation with Mr Sibongile Mzinyathi ("**Mr Mzinyathi**"), elected to proceed with the Charges. Papers will be served at the above address and by way of email to the email addresses of Dr Pretorius: jppretorius@npa.gov.za and kbenjamin@npa.gov.za. The President's failures relate directly to Dr Pretorius and his misconduct.

36. The fourth respondent is Mr Mzinyathi, the Director of Public Prosecutions, North Gauteng, whose place of business is at Victoria and Griffiths Mxenge Building, 123 Westlake Avenue, Weavind Park, Silverton, Pretoria. Papers will be served at the above address and electronically at

jppretorius@npa.gov.za; kbenjamin@npa.gov.za; skabrahams@npa.gov.za; and hzwart@npa.gov.za. The President's failures relate directly to Mr Mzinyathi and his misconduct.

37. The fifth respondent is the NPA. The NPA's office is located at Victoria and Griffiths Mxenge Building, 123 Westlake Avenue, Weavind Park, Silverton, Pretoria. Papers will be served at the above addresses and electronically at ippretorius@npa.gov.za; kbenjamin@npa.gov.za; skabrahams@npa.gov.za; and hzwart@npa.gov.za

STANDING AND A CLEAR RIGHT

38. The applicants approach this court on an urgent basis to guard against a constitutional crisis, where it appears that independent institutions, such as the NPA, are being abused; have been captured or unduly influenced by third parties; are acting irrationally, arbitrarily or for ulterior purpose and the political or financial gain of others; are being led or manned by individuals who lack the requisite competence and/or are acting in a manner glaringly at odds with their mandates.

39. These principle of legality concerns, coupled with the national importance of the matter, the implications for the functioning of the Executive, perceptions of NPA independence and the devastating economic and other effects of the abuse of these powers, make it uniquely in the public interest for the second to fourth respondents immediately to be suspended from office and subjected to the enquiries.

40. The applicants clearly have standing to pursue this matter, and rely on clear rights (of their own and of the public's) to ground the relief sought.

41. In addition to what has been stated above pertaining to the applicants acting in their own and the public interest, it is clear that the President's failures do violence to our constitutional democracy and must, in the public interest, be rectified without delay. This is thus pre-eminently a case where the applicants should, and do, act in the public interest.

42. As the Constitutional Court has recently held:

> "*One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.*"[1]

43. It is further trite that the NPA is enjoined to act lawfully, and to fight, *inter alia*, corruption and organised crime relentlessly, independently and effectively.

44. The applicants, and, indeed, all people in the Republic, have a clear constitutional right to an independent and functioning criminal justice system, where public power will be mobilised rationally and lawfully. They further enjoy the rights that the institutions tasked with implementing such system, such as the NPA, act responsibly, independently and in the best interests of the administration of justice. Furthermore, the applicants, and the public at large, are entitled to expect the President to act on his constitutional and

[1] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC), para [1].

statutory duty to exercise his powers where the necessary jurisdictional facts exist. In the present case, these jurisdictional facts are undeniable, yet the President is unmoved, and thus he fails in his constitutional duty.

45. The applicants, as well as the public, have a right to expect public office bearers and State institutions to act lawfully and rationally, and that the NPA's powers are exercised in the best interests of the Republic.

46. Where there is a clear case, as there is in the present case, that the offices of the NPA are in fact being abused, then those with the public power to remove office bearers must do so without delay. Where the empowered official fails to exercise this power, his failure falls to be set aside without any delay.

47. Ultimately, this matter implicates a number of clear rights enjoyed by the applicants and the public (on whose behalf the applicants also litigate). The applicants have a clear right (grounded in at least the principle of legality and the rule of law) to review the decisions, have them set aside and have the necessary processes under section 12(6) of the NPA Act set in motion without delay.

A HISTORY OF INVESTIGATION AND PERSECUTION

48. It is notorious that, for some time now, Min. Gordhan and his co-accused have been the subject matter of various investigations by the Directorate for Priority Crime Investigation ("**DPCI**"). The manner in which these investigations have been conducted, coupled with the various and contradictory statements by the DPCI, are only reasonably explicable on the basis that Min. Gordhan is being targeted for sinister ulterior purposes or to further the political agenda of others.

Appointment

49. Min. Gordhan's reappointment (in December 2015) as the Minister of Finance came at a time when there was a perceived attempt to "capture" the National Treasury. When Mr Nhlanhla Nene was summarily removed as Minister of Finance and replaced by the relatively unknown Mr Des van Rooyen, speculation was rife that this was a cynical ploy, by high-placed individuals within government, to gain access to the Treasury to ensure that certain investments were made and projects invested in. Media articles to this end are annexed marked "**FA2**".

50. In any event, amidst an economic meltdown in reaction to the Cabinet reshuffle, Min. Gordhan was, days thereafter, appointed as Minister of Finance in December 2015. Since then, it has been widely reported (which clippings are annexed marked "**FA3**") that Min. Gordhan and the National Treasury are at odds with other elements of the State regarding:

50.1 The composition of the board of directors of South African Airways SOC Limited;

50.2 The State funding and adoption of various nuclear energy programmes and proposals;

50.3 Agreements entered into by state-arms company Denel SOC Limited;

50.4 Eskom Holdings SOC Limited's review of its contractors;

50.5 The structuring of the South African Revenue Service; and

50.6 Generally, the corporate governance and funding of the government and state-owned entities.

Investigation of the so-called SARS rogue unit

51. Against the background of the above disputes, it emerged that the DPCI was investigating an alleged rogue unit within the South African Revenue Service (the so-called SARS rogue unit). This is despite the existence of such unit being known for years, and having been reported on by third parties and the media from as far back as 2014. Reports varied as to whether Min. Gordhan was a suspect in this investigation.

52. Min. Gordhan was ultimately called upon to answer the notorious "27 questions"; was then assured that he was not a suspect in the investigation, and then, summarily, was called upon to present himself to give a warning statement, seemingly in anticipation of imminent charging.

53. The basis of the prefaced charges were groundless, and no charges were, in fact, proceeded with.

The charges

54. On 11 October 2016, summons no. 574/16 was served on, *inter alios*, Min. Gordhan (a copy of which is annexed marked "**FA4**"). The charges included allegations of theft and fraud in relation to the alleged payment by SARS to the Government Employees' Pension Fund of Mr Pillay's early retirement pension deduction, and allegations of fraud in relation to the rehiring of Mr Pillay by SARS in or around April 2014.

55. At no time were allegations of fraud or theft ever put to the accused; indeed, these charges were distinct from those which had been investigated and publicised up until this point.

56. The applicants understand that Mr Abrahams was, at all relevant times and in particular prior to 11 October 2016, a member of "the reference group", or a

group by another name, which included government officials and/or intelligence officials and/or police officials and/or other law enforcement personnel who would regularly and secretly discuss *inter alia* various law enforcement issues including criminal investigations and the bringing of criminal charges against the accused and/or issues related to these charges. The applicants understand that these meetings were held *inter alia* at the offices of the NPA. The applicants invite Mr Abrahams to explain these interaction and/or his involvement with the aforesaid group and any discussions he may have with any of the aforesaid individuals in relation to the Charges.

The 11 October press conference

57. The 11 October press conference at which Mr Abrahams, in his capacity as NDPP and head of the NPA, announced these new charges, was farcical. It was also an unlawful abuse of power in its own right.

58. Before addressing the Charges, Mr Abrahams spent the first 30 minutes of his press conference preaching on the unlawfulness of the so-called SARS rogue unit. Mr Abrahams asserted that the SARS rogue unit was "*unlawful*" in that it was covert in nature and that the creation of the unit was a violation of legislation and the Constitution. He further asserted that those who operated the unit, those who authorised its establishment and those who maintained its existence violated the SARS Act, the National Strategic Intelligence Act, 1994 and the Constitution. Mr Abrahams and the NPA thus asserted, as a proposition of fact and law, that each of Mr Pillay, Mr Magashula and Min. Gordhan acted unlawfully and unconstitutionally.

59. These statements, of course, had nothing to do with the charges actually preferred against the accused, and were in relation to an investigation which

the NDPP himself conceded was "*incomplete and ongoing*", and which had resulted in no charges. These statements were thus of no relevance at all to the Charges, and served only, publicly and indeed globally, to smear the names and reputations of those involved with the so-called SARS rogue unit. This can, regretfully, only speak to ulterior purpose, and a desire to harass and intimidate the accused on a global platform.

60. In addition, it evidences the NDPP's impermissible pre-judging of a matter where he may be called upon to exercise his constitutionally afforded review powers - clearly he has now rendered himself incapable of doing so in an objective manner, and at least the perception of the independence of the NPA has suffered yet another death-knell.

61. This public prejudging of a live matter before an investigation has even been concluded falls far short of the actions required of an NDPP, particularly where charges have not even been made (and, as can be seen in respect of the Charges, Mr Abrahams' standards for sufficient evidence to lay charges are impermissibly low in any case, to the point of being risible). This in itself shows that Mr Abrahams holds a patent and shameless prejudice towards the SARS rogue unit case and with respect to the accused. Worse still, it appears that Mr Abrahams did not even realise that his lengthy commentary and prejudgment in the SARS rogue unit matter were manifestly improper, or if he did, he acted with a clear intention to malign those accused by means of show trial. These considerations simply emphasise his unsuitability to hold the high office of NDPP.

62. In any event, if Mr Abrahams, as stated, believed that there was a difference between unlawfulness and criminality of conduct, and the latter was still under investigation, on what basis does the NPA, which is tasked with prosecuting *criminal*, and not simply unlawful conduct, make lengthy

comments about the lawfulness of conduct especially where no decision on a prosecution has been made? There can be no proper purpose for such statements. This reveals an astonishing lack of propriety and requisite judgment on the part of Mr Abrahams, as well as a lack of integrity and a devious intention to malign the accused.

63. In revealing his motive and prejudice, Mr Abrahams, disturbingly yet tellingly, violated the rights of the accused and abused his position. He misused his office to smear the SARS unit and, by association, the accused, since none of these statements bore any relation to the new Charges he then announced. I am advised that the NPA is not permitted to use the media in an attempt to influence public opinion against an accused or suspect, not least of all on charges that are not even being preferred against him. Yet that is precisely what the Mr Abrahams sought to do, having admitted at the 11 October press conference that the SARS rogue unit had nothing to do with the Charges.

64. Confoundingly, Mr Abrahams then spent less time explaining the new charges than he did defaming the accused by association with his inappropriate musings on the SARS rogue unit. When he did eventually turn to the Charges, Mr Abrahams did not explain how the Charges in question were supported in evidence. On the contrary, he mentioned that the early retirement of Mr Pillay (which was the object of the Charges relating to fraud and alleged theft) was preceded by at least 3 000 other cases of early retirement in the 5 years prior to Mr Pillay's retirement. Mr Abrahams referred to an affidavit from the Director General of the Department of Public Administration which described the circumstances under which early retirement is usually given, and explained that it was ordinarily granted for the purposes of transformation within state entities.

65. Despite the very obvious lack of substance to the Charges, Mr Abrahams stridently defended and justified them in the press conference, including stressing that any suggestion (as was made by Min. Gordhan) that the Charges are groundless and constitute "*no more than a bitter political mischief*" is, "*as you will come to learn, ... nothing further from the truth*".

66. Either the NDPP was thus fully apprised of the facts, and was incompetent in believing the Charges to be sustainable, or the NDPP was not fully apprised with the relevant facts, and thus acted grossly negligently and recklessly, if not deliberately cynically, in announcing the credibility of the Charges to the world.

67. There are also a number of revealing statements made by Mr Abrahams in response to questions from the media at the conference. When asked whether, in light of the 3 000 other instances of early retirement, there had been any prosecutions for fraud on the basis of early retirement before, Mr Abrahams said that he could not say off the cuff. The admission is revealing in the extreme. It shows that, despite the fact that the Charges against Min. Gordhan had been preceded by 3 000 other instances of similar conduct, Mr Abrahams and the prosecutors did not bother to check if any of these 3 000 had been criminally prosecuted, nor did he direct investigations into the ubiquitous and accepted practice in relation to early retirement in state institutions. This indicates both: (a) breath-taking incompetence, in that Mr Abrahams did not, despite knowing of the 3 000 precedents, consider this evidence which clearly indicated that crucial elements of the charge, namely lawfulness, or at the very least, intention was absent; and (b) ulterior motive, in that, despite being aware of 3 000 other instances of the conduct in question, only the conduct concerning the accused was to be prosecuted.

68. Min. Gordhan's attorneys, on 11 October 2016, published a statement on behalf of Min. Gordhan (annexed marked "**FA5**"). Its content speaks for itself; I pray that it is incorporated by reference. It is notable that it was stressed that the NPA had reneged on its undertaking first to interact with Min. Gordhan before any decision to prosecute was taken, and that Min. Gordhan had not even been informed he was an accused in this matter on the new charges.

69. Finally, during the press conference, Mr Abrahams made a jocular, but not inaccurate, remark that he is accountable for everything that happens within the NPA. Later, and with great hubris, Mr Abrahams then declared that the days of disrespecting the decisions of the NPA were over and, further, that the days of not holding government officials to account were over (a sentiment which, apparently, does not apply to himself or others within the NPA). Mr Abrahams, who had declared his responsibility for all that occurred within the NPA, and declared grandly that government officials would be held to account, would pusillanimously later attempt to distance himself completely from the Charges, placing the blame on Min. Gordhan, the other accused persons, Dr Pretorius and Mr Mzinyathi.

70. This back pedalling began (in the face of scathing public criticism) on or about 13 October 2016, when Mr Abrahams issued a public statement, seemingly distancing himself from any decision to prosecute Min. Gordhan and indicating that he believed himself endowed with the power to review the decision to prosecute and to withdraw the Charges, and was indeed open to reconsidering the Charges. A copy of media reports recording this statement are annexed marked "**FA6**".

The applicants challenge the decision

71. Between 13 and 18 October 2016, there was a flurry of correspondence between the applicants and the NPA / NDPP (the relevant correspondence is annexed as bundle "**FA7**", with annexes). The contents of this correspondence speak for itself, and I pray it be incorporated by reference.

72. Ultimately, the applications placed the NDPP on terms to withdraw the charges, alternatively to provide information and reasons related to the decisions to prefer the Charges. These demands were not complied with, causing the applicants to launch urgent Court proceedings to set aside the Charges as being unlawful.

73. During this exchange of correspondence, and as new facts came to light after the launch of the proceedings, it emerged that the NDPP and NPA were still desperately trying to procure information in relation to the charges, which information was necessary to allow for a proper consideration thereof.

74. The Charges are, of course, either supportable or insupportable on the basis of the docket, and the sustainability of the decision to prosecute must be decided on that basis. The very fact that the NDPP sought to institute further investigations after the announcement of the Charges illustrates that there was obviously insufficient evidence to sustain the Charges.

75. Where there was plainly no evidence which warrants the continuation of any prosecution based on the Charges and overwhelming reasons for withdrawal, the NDPP's failure timeously to withdraw the Charges serves on its own to confirm that he is not capable of acting in a manner that is independent, impartial and conscientious. It is telling to note that, at the time, in response to an invitation to make representations to the NDPP in relation to the review of the Charges, it was reported that Min. Gordhan "*does not have any*

confidence in the National Director of Public Prosecutions' ability or willingness to afford him a fair hearing", as appears from the article annexed marked "**FA8**".

76. After launching urgent proceedings, the applicants became aware of a subpoena issued to the CEO of the Government Pensions Administration Agency (photographs of which I annex marked "**FA9**"). The subpoena on its face was issued on 20 October 2016 under section 205 of the Criminal Procedure Act, 1977. It called on the CEO to submit:

76.1 appendices A and B to the 18 October 2010 memorandum, on which charge 1 of the Charges, and the alternative to charge 1, are based ("**the Memorandum**"). Those appendices are: (a) the statistics showing that, over the five years prior to August 2010, the GEPF has approved over 3000 requests from various government departments for staff members to retire before the age of 60 with full benefits; and (b) evidence that the former and current Ministers of Finance have approved five such requests over the two years prior to August 2010;

76.2 an affidavit:

76.2.1 explaining the approval of the 3000 requests from various government departments for early retirement on full benefits between 12 August 2005 and 12 August 2010; and

76.2.2 giving an explanation as to whether the GEPF approves requests from government departments for early retirement.

77. The *subpoena* is an indictment of the prosecutorial process leading to the Charges. It is also clear that the NPA never had sufficient evidence to take the formidable decision to prefer charges against the accused. Clearly, any

evidence which spoke to the practices and lawfulness of early retirement of public servants with full pension had to be fully investigated and considered *before* charging the accused. This is particularly so where this evidence is referenced in the very document on which the prosecution is based - ie, the Memorandum. The Memorandum is specifically referenced in charge 1 of the Charges. The prosecuting authorities were thus expressly directed to, and must have been aware of, the existence of such potentially exculpatory evidence.

78. This evidence was not even sought, much less considered. The decision to prosecute thus clearly failed to consider the actual evidence pertinent to the charge - indeed, it appears as if the second to fourth respondents elected to ignore any facts which had the potential to corroborate the lawfulness of the conduct in question. This not only speaks to the substantive irrationality of the decision to prosecute, but also reinforces the submission that the Charges were pursued for an ulterior purpose, in breach of the constitutional mandate of the NPA. That the prosecuting authorities were only then, days after the announcement of the Charges, calling for the evidence and considering the applicable laws, simply reinforces the unlawfulness of the Charges and the abusive and precipitous manner in which they were pressed.

The decision to withdraw and press conference

79. On the morning of 31 October 2016 at approximately 10:25 am, Mr Abrahams informed the applicants' attorneys that he was withdrawing the Charges. It is understood by the applicants that the accused also received such notification.

80. Minutes later, at approximately 10.30am, Mr Abrahams held a press conference where he would announce to the public that the Charges had been withdrawn ("**the 31 October press conference**"). Before announcing the actual withdrawal of the Charges, however, Mr Abrahams spent a great deal of time attempting to distance himself from the decision to prosecute. He alleged that there had been general public misconception of the NDPP's role, that he did not institute the decision to prosecute in this matter, that he had acted only as a spokesperson at the 11 October press conference, that he had not reviewed the evidence himself before announcing the decision to prosecute on 11 October 2016 and that he only become involved in the decision after the conference when called on to review the Charges. He also attempted to paint the process as one which happens on a regular basis.

81. Mr Abrahams engaged in another long legal expose with respect to the interpretation of various provisions and continued to suggest that Mr Pillay's early retirement had been suspicious and that the early retirement "*did not advance SARS' business interests*". These assertions, however, had nothing to do with the criminality of the conduct of the charged individuals with respect to the Charges. The assertions made by Mr Abrahams at this stage were thus irrelevant and seemingly made simply in an attempt to preserve (or manufacture) a cloud of suspicion over the accused, despite the dropping of the Charges. As he had done at the 11 October press conference, Mr Abrahams continued to abuse his position as NDPP to malign and cast aspersions on the accused, despite the fact that the press conference had in fact been called to withdraw the Charges.

82. Mr Abrahams then turned to the relevant information. Mr Abrahams alleged that the NPA had not seen a memorandum to the then Commissioner of SARS, Mr Magashula, from SARS Legal & Policy Division's Mr Vlok

Symington dated 17 March 2009 (a document which was attached to the applicant's 14 October 2016 letter, which is in bundle "**FA7**") ("**the Symington memorandum**"). This document was alleged by Mr Abrahams to be the key document which Mr Abrahams relied on to withdraw the Charges. If the Symington memorandum was utterly dispositive of the question of intent (or lack thereof) as he alleges, it is astonishing that Mr Abrahams had not simply dropped the Charges upon receipt of this document on 14 October 2016. Instead, Mr Abrahams admitted that he called for numerous items of further evidence.

83. But the Symington memorandum was not the reason why the Charges were unsustainable. They were unsupportable from the outset. Mr Abrahams and the NPA at no stage had any evidence of fraudulent or furtive intention by any of the accused. Moreover, there was nothing unlawful about any of the accused's' conduct in this matter, as set forth in the 14 October 2016 letter. The Symington memorandum simply stated what would already have been evident to any rational, conscientious prosecutor, and one with integrity. Indeed, if the Symington memorandum was so pivotal, there would clearly have been no need to issue the subpoena. What Mr Abrahams' conduct after 14 October 2016 reveals is that he was actively seeking to bolster the feeble case against the accused through his further enquiries. Moreover, it is not clear why the Symington memorandum would have been of any consequence in relation to the Charges pertaining to the renewal of Mr Pillay's employment agreement in 2014.

84. Mr Abrahams announced the withdrawal of the Charges at the 31 October press conference. He accordingly withdrew the Charges. One may have expected that, for a blunder as monumental as this, that a conscientious and constitutionally minded NDPP would resign or, at the very least, apologise.